IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 5, 2007 Session

DONNA HATMAKER PIERCE v. ROBERT JERROLD PIERCE

Appeal from the Circuit Court for Loudon County
No. 5587 Russell E. Simmons, Jr., Judge

No. E2007-01403-COA-R3-CV - FILED JUNE 26, 2008

In this post-divorce case, Donna Hatmaker Pierce ("Wife") asked the court to find Robert Jerrold Pierce ("Husband") in contempt for his purported failure to ensure that Wife received her proper share of his retirement benefits under the parties' Marital Dissolution Agreement ("MDA"). The MDA awarded Wife "one-half of the value of husband's retirement accounts with Boilermakers Union and National Guard" that accrued during the marriage. Wife argues that the phrase "retirement accounts with . . . National Guard" was intended to include Husband's "Civil Service" retirement annuity, which he earned from a full-time weekday job that was connected to, but distinct from, his weekend National Guard duty at a nearby location. Husband points out that the National Guard retirement account and the Civil Service annuity are separate accounts, and argues that the MDA did not grant Wife any portion of the Civil Service account. After a bench trial, the court adopted Wife's interpretation and awarded her one-half of the Civil Service account. Husband appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Sandra G. Olive, Knoxville, Tennessee, for the appellant, Robert Jerrold Pierce.

Tom McFarland, Kingston, Tennessee, for the appellee, Donna Hatmaker Fraley, formerly Pierce.

OPINION

I.

Husband and Wife were divorced in January 1996. This case arose in June 2005, when Wife filed a "Petition for Contempt" claiming that she was not receiving the proper payments from Husband's retirement accounts. Husband has three separate retirement accounts: 1) the Boilermarkers' Union account, which resulted from his "various jobs with TVA" through the early

1980's; 2) the National Guard account, which resulted from Husband's "work[] for the Guard once a month on weekends and two weeks a year in the summer" starting in or around 1983; and 3) the Civil Service account, which resulted from Husband's full-time weekday job as a technician, which he obtained by joining the National Guard, and during which employment he wore his National Guard uniform. Husband was 58 years old at the time of trial in 2007, and was not yet eligible to receive benefit payments from either the Boilermakers' Union account or the National Guard account. However, in 2003 he began receiving payments from the Civil Service account, and he did not send any portion of these payments to Wife. This fact formed the basis for Wife's contempt petition.

Husband contends that he was never required to send Wife any portion of the Civil Service account, because the MDA specifies only the Boilermakers' Union and National Guard accounts. Specifically, paragraph 14 of the MDA states, in pertinent part, as follows:

> PERSONAL PROPERTY: Wife shall receive the 1990 Jeep Cherokee, household furniture, *one-half of the value of husband's retirement accounts with Boilermakers Union and National Guard which accumulated up until the entry of the Final Decree* and any personal property currently in her possession.

(Emphasis added.) In response to Husband's assertion that Wife's action is meritless because the MDA does not grant her any portion of the Civil Service account, Wife responded as follows:

> It is averred that the "Civil Service Retirement Annuity" was commonly referred to during the marriage and in the negotiation process pursuant to the divorce as part of the "National Guard Retirement." The [Husband] is now trying to claim that the Civil Service Retirement Annuity is not a part of what the parties were referring to in paragraph 14 of the Marital Dissolution Agreement.
>
> * * *
>
> [I]t is the [Wife]'s position that the [Husband] is simply attempting to hide behind semantics to avoid the distribution of the property in this matter as previously ordered by the court and therefore, he should be found in contempt and punished therefore.

At trial, after Wife's oral argument but before Husband's oral argument, the trial court announced *sua sponte* that it would "bifurcate" the proceedings. The court explained its decision as follows:

> I'm going to try this as a bifurcated hearing. I'm going to interpret the Marital Dissolution Agreement first. I'm not going to consider contempt at this time, and we'll set another hearing several months off and determine contempt at that time. If I rule against Mr. Pierce,

> he'll have some time to comply with that before we hear a contempt on it. . . . I'm not going to interpret the contract and at the same time hold him in contempt if he interpreted it differently. . . . There's no way that's a willful contempt. But if once I've interpreted it, if he doesn't abide by it, then we'll have the contempt hearing, all right?

The ruling effectively converted Wife's contempt action into a declaratory judgment action, as it declared preemptively that Husband was not in contempt, regardless of how the MDA is interpreted. Neither party objected to this "bifurcation." Husband now raises the propriety of the "bifurcation" as an issue on appeal, but having failed to object below, he will not now be heard to complain about this procedure – particularly where the court's ruling inured to *his benefit* by removing any possibility that he would be immediately found in contempt. *See generally* ***Lawrence v. Stanford***, 655 S.W.2d 927, 929 (Tenn. 1983). ("It has long been the general rule that questions not raised in the trial court will not be entertained on appeal.")

Husband and Wife each testified at the trial below. At the conclusion of the trial, the court ruled as follows:

> All right. The Court has listened to the testimonies of the parties, observed their demeanors, attested[1] [sic] their testimony in light of prior statements and actions of the parties. The Court finds, first, that paragraph 14 of the Marital Dissolution Agreement concerning one-half of the value of the husband's retirement accounts with Boilermaker Union and National Guard includes what is now referred to by [Husband] as his Civil Service Retirement.
>
> The Court bases its interpretation of the contract on the following factors[:] the wife fully, by her testimony, intended that the retirement accounts be all of the retirement accounts of the husband. The Court finds that if the husband intended at the time the agreement was entered that he would get separately the Civil Service Retirement, he would have insisted that that be in his share of the property that he got. Also, the Court bases this on the finding that the wife did receive a call from the husband informing her that she would be getting the retirement account. The Court believes the testimony of the wife over the testimony of the husband in that testimony.
>
> Now, if the Court didn't find the interpretation to be that the husband intended to include in the retirement accounts this Civil Service Account, then the Court would have to find that the husband . . . fraudulently entered the Marital Dissolution Agreement without

[1] We believe the court actually used the phrase "and tested," and the court reporter mistakenly transcribed it as "attested."

> making full disclosure . . . because he did not disclose that these were separate accounts and he did not make any indication in here that he intended to get it. The Court can't see it any other way. Either . . . that's what the parties intended or he defrauded his ex-wife.

(Footnote added.) The trial court certified its ruling as a final judgment in accordance with Tenn. R. Civ. P. 54.02.

Husband objects strenuously to the alternative holding that he "defrauded his ex-wife." He argues that fraud was not specifically alleged, that a Tenn R. Civ. P. 60 motion to set aside the final order due to fraud would have been untimely, and that an independent action for fraud would have failed because there was no evidence of extrinsic fraud. We need not address these points because, as will be seen, we uphold the court's ruling based on its primary holding, not its alternative holding.[2] We quote from the alternative holding only because some of its language helps clarify the court's reasoning in the primary holding. Specifically, by musing on what the alternative holding would be "if the Court didn't find the interpretation to be that the husband intended to include in the retirement accounts this Civil Service Account," the trial court made clear that the primary holding presupposes that Husband *did* intend to include the Civil Service account. This is a key point because of the court's earlier statement that "*the wife* fully . . . intended that the retirement accounts be all of the retirement accounts of the husband." (Emphasis added.) We conclude that the trial court's primary holding is based on a factual finding that *both* Husband *and* Wife intended to include the Civil Service account among the retirement accounts listed in the MDA. We now proceed to consider the merits of this finding.

II.

There are essentially two issues that must be decided: whether the court acted properly in considering parol evidence in its interpretation of the MDA, and whether the court interpreted the MDA correctly. Both issues are closely related to the threshold question of whether the contract was ambiguous. As Judge, now Justice, William H. Koch, Jr., wrote in a Court of Appeals opinion in 1990,

> [r]esolving disputes concerning written contracts involves a two-step process. First, as a threshold matter, the court must determine whether the contract is ambiguous. This is a question of law. If the contract is ambiguous, then the finder of fact must ascertain the parties' intentions. If, however, the contract is unambiguous, then construing its meaning and legal effect are questions of the law for the court.

[2] Husband's claim that the court made "inconsistent findings" is without merit. The court made quite clear that these are *alternative* holdings.

Anderson v. DTB Corp., 1990 WL 33380, at *2 (Tenn. Ct. App. M.S., filed March 28, 1990) (citations omitted). In the instant case, the existence or nonexistence of ambiguity is crucial both to the substance of the parol evidence issue and to the standard of review for the interpretation issue.

The trial court did not make a specific finding regarding whether the contract was ambiguous. However, "[p]arol evidence may not be considered unless the writing is ambiguous," ***McMillin v. Great Southern Corp.***, 480 S.W.2d 152, 155 (Tenn. Ct. App. 1972), and the court made clear that it considered parol evidence in reaching its ruling. Specifically, as noted earlier, the court said it "bases its interpretation of the contract" on, among other things, Wife's testimony about her intent, as well as logical deductions regarding Husband's intent based upon the parties' testimony. Since these would be improper grounds for interpretation of an unambiguous contract, we conclude that the court implicitly held the MDA to be ambiguous with regard to the definition of the retirement accounts referenced in paragraph 14 of that document.

As already stated, the existence or nonexistence of ambiguity is a question of law. ***Anderson***, 1990 WL 33380, at *2; *see also* ***Alexander v. Armentrout***, No. 03A01-9807-CV-00205, 1999 WL 38287, at *4 (Tenn. Ct. App. E.S., filed January 14, 1999) ("our case law uniformly holds that the ambiguity of a document . . . is a question of law") (*rev'd on other grounds*, ***Alexander v. Armentrout***, 24 S.W.3d 267, 274 (Tenn. 2000)). The language of a contract is ambiguous when its meaning is uncertain and when it can be fairly construed in more than one way. ***Farmers-Peoples Bank v. Clemmer***, 519 S.W.2d 801, 805 (Tenn. 1975). An ambiguity may be either patent or latent. "The distinction between patent ambiguity on the one hand and latent ambiguity on the other has been characterized as 'ambiguous terms (of the written instrument)' as opposed to 'ambiguous facts.' " ***Gredig v. Tennessee Farmers Mut. Ins. Co.***, 891 S.W.2d 909, 915 (Tenn. Ct. App. 1994) (quoting ***Union Planters Corp. v. Harwell***, 578 S.W.2d 87, 92 (Tenn. Ct. App. 1978)). *See also* ***Teague v. Sowder***, 114 S.W. 484, 488 (Tenn. 1908) ("latent ambiguity is where the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer").

"A strained construction may not be placed on the language used to find ambiguity where none exists." ***Id.*** Words must be construed in accordance with their usual and ordinary meaning. ***St. Paul Surplus Lines Ins. Co. v. Bishops Gate Ins. Co.***, 725 S.W.2d 948, 951 (Tenn. Ct. App. 1986). "An ambiguity does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions." ***Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc.***, 884 S.W.2d 458, 462 (Tenn. Ct. App.1994). "Neither the parties nor the courts can create an ambiguity where none exists in a contract." ***Id.*** This rule does not change merely because the results of a literal interpretation may be harsh. "The courts will not make a new contract for parties who have spoken for themselves, and will not relieve parties of their contractual obligations simply because these obligations later prove to be burdensome or unwise." ***Vargo v. Lincoln Brass Works, Inc.***, 115 S.W.3d 487, 492 (Tenn. Ct. App. 2003) (citations omitted).

In the instant case, the central question is whether the phrase "husband's retirement accounts with Boilermakers Union and National Guard" is ambiguous on these facts. Although "the entire contract should be considered in determining the meaning of any or all its parts," ***Cocke County Bd. of Highway Comm'rs v. Newport Util. Bd.***, 690 S.W.2d 231, 237 (Tenn. 1985), in this instance the

remainder of the MDA is of little help in interpreting the meaning of the disputed language. We therefore focus on the phrase in question. In essence, we are called upon to decide whether the words "husband's retirement accounts with Boilermakers Union and National Guard" necessarily and obviously refer only to the two particular accounts to which Husband points. We conclude that this interpretation is not so self-evidently correct as to make the phrase unambiguous. The language at issue is not self-defining when applied to these facts; indeed, it is difficult to see how the language could be given meaning at all without resort to extrinsic evidence. This is a classic case of latent ambiguity. The MDA does not state the total number of accounts in question or give detailed information about the accounts. If the MDA had, for example, recited account numbers for these accounts, or if it had referred to "husband's *two* retirement accounts, one with Boilermakers Union and one with the National Guard," then perhaps it would have been unambiguous. As written, however, the MDA leaves the exact nature (and number) of the accounts open to interpretation. We therefore affirm the trial court's implicit holding that the language is ambiguous.[3]

As noted earlier, ambiguity is a necessary prerequisite to the resort to parol evidence, but its existence does not by itself establish that the use of parol evidence in this case was proper. "Parol evidence may not be considered unless the writing is ambiguous *and then only to explain, not to contradict or vary*." ***McMillin***, 480 S.W.2d at 155 (emphasis added). We think, however, that this is indeed a case where the court properly admitted "extrinsic evidence which tends to aid, confirm, or explain a writing rather than alter it, or which assists the court in understanding and interpreting the language of the writing." ***Faulkner v. Ramsey***, 158 S.W.2d 710, 711-12 (Tenn. 1942). The court could not have meaningfully interpreted the phrase "husband's retirement accounts with Boilermakers Union and National Guard" *without* considering parol evidence of what those accounts *are*. Under these circumstances, the court was "permitted to use parol evidence, including the contracting parties' conduct and statements regarding the disputed provision, to guide the court in construing and enforcing the contract." ***Allstate Ins. Co. v. Watson***, 195 S.W.3d 609, 612 (Tenn. 2006). We hold that this is exactly what the court did, and thus we find no error in the admission of parol evidence.

That leaves the question of whether the court, in construing the contract with the help of the parol evidence, arrived at the correct interpretation. "A mixed question of law and fact arises where the construction of a written agreement depends on extrinsic facts as to which there is a dispute." ***State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust***, 209 S.W.3d 595, 599 (Tenn. Ct. App. 2006). This affects the standard of review as follows:

---

[3]Husband correctly points out that "[a]n ambiguous provision in a contract generally will be construed against the party drafting it." ***Allstate Ins. Co. v. Watson***, 195 S.W.3d 609, 612 (Tenn. 2006). However, we do not believe this general rule is dispositive of the instant case. The rule's applicability is at the very least diminished where the ambiguity in question is latent rather than patent. *See* ***Union Planters***, 578 S.W.2d at 92 (holding that rule construing contractual ambiguities against the drafter did not apply where ambiguity arose from "ambiguous facts" rather than "ambiguous terms"). In any event, as will be seen, credibility determinations were crucial to the trial court's resolution of the latent ambiguity. It would be inappropriate, on these facts, to overturn the trial court's judgment simply because the MDA was drawn up by Wife's attorney.

> A presumption of correctness does not attach to mixed questions of fact and law. Although a presumption of correctness attaches to the trial court's findings of fact, we are not bound by the trial court's determination as to the legal effect of its factual findings, nor by its determination of a mixed question of law and fact. Our standard of review of rulings on mixed questions of fact and law is de novo with a presumption of correctness extended only to the trial court's findings of fact.

Id. (citations omitted). Even in the context of such a mixed question of law and fact, the trial court's findings are accorded strong deference when they are based on witness testimony, "especially where issues of credibility and weight of oral testimony are involved." ***Allstar Consulting Group v. Trinity Church & Christian Center***, No. W2006-00272-COA-R3-CV, 2007 WL 120046, at *5 (Tenn. Ct. App. W.S., filed January 18, 2007) (quoting ***Collins v. Howmet Corp.***, 970 S.W.2d 941, 943 (Tenn. 1998)).

In the instant case, the trial court specifically stated that it "believes the testimony of the wife over the testimony of the husband" regarding a purported phone call between the parties in 2003, during which Husband allegedly told Wife that she would soon be receiving retirement payments. Moreover, it is clear that the court made factual findings – predicated, at least in part, on credibility determinations – with respect to the parties' conduct before and during the divorce proceedings. The court stated that it "has listened to the testimonies of the parties, observed their demeanors, attested [sic] their testimony in light of prior statements and actions of the parties," and has concluded that the proper interpretation of the MDA is the one advanced by Wife. The court said it "bases its interpretation of the contract" on, among other things, the fact that Wife "fully, by her testimony, intended that the retirement accounts be all of the retirement accounts of the husband." As noted earlier, the court also held that Husband shared this intent, and it seems clear that this latter holding was similarly based on a weighing of the parties' testimony.

The trial court's legal inquiry is certainly the correct one. "The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles." ***Rainey v. Stansell***, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992). The only question remaining for us to resolve is whether, granting a presumption of correctness to the trial court's factual findings and heightened deference to its credibility determinations, the evidence preponderates against the court's finding that both parties intended in 1995 for the Civil Service account to be included in the phrase "husband's retirement accounts with Boilermakers Union and National Guard." We find no such preponderance. The court's finding is adequately supported by the evidence in the record.

Wife testified that, during the course of the marriage, the parties "routinely refer[red] to" the National Guard and Civil Service accounts simply as "National Guard, Tennessee National Guard," and that Husband never revealed prior to the drafting of the MDA "that he called part of these accounts by any other name." Indeed, she stated that she did not remember "ever hear[ing] the term Civil Service annuity before [Husband's] deposition" in connection with the hearing below. She testified on cross-examination as follows:

> Q. [O]ne [of Husband's paychecks] was [for] what you're calling the full-time National Guard?
>
> A. That's all he ever called it. That's all I ever knew it to be. When I filled out applications, and they said your husband's occupation, I put full-time National Guard for Tennessee, because that's what I was told he worked at.

Wife further testified that, to her knowledge, Husband's weekday Civil Service job and his weekend National Guard job took him to the "same place," namely "the Armory . . . where the helicopters were," and that "[h]e wore his [National Guard] uniform . . . every day" for both jobs. Husband contends that his work stations were at "different location[s]," with the Civil Service location "being on the north end of the Airbase." However, the two locations are apparently very close to one another. Furthermore, it is undisputed that Husband had to join the National Guard in order to get the Civil Service job.

Husband points out that his weekday and weekend positions had different job descriptions; that his payroll statement from the weekday job contained a specific deduction for "CSRS," or Civil Service Retirement System; and that Wife knew Husband got separate paychecks for the two jobs. However, we do not regard these facts as dispositive. Reasonable minds might disagree on how to interpret the evidence in this record, but under a preponderance standard with a presumption of correctness, and particularly in light of the importance of credibility determinations to this case, we cannot disturb the trial court's ruling on these facts. It is reasonable to conclude, based upon this evidence, that the parties made no distinction, either in their marriage or in the divorce proceedings, between Husband's National Guard duty and his National Guard-related "Civil Service" job. Thus, it is also reasonable to conclude that the parties intended the phrase "husband's retirement accounts with Boilermakers Union and National Guard" to include the Civil Service retirement account.

III.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Robert Jerrold Pierce. The case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law.

_____

CHARLES D. SUSANO, JR., JUDGE